

REG-33-012 PROCEDURE FOR PROCEEDING BEFORE THE COMMISSIONER

012.01 Scheduling of hearings. The time and place of any hearing shall be set by the Commissioner or his authorized representative after proceedings have commenced. The hearing shall be scheduled as soon as practicable. Written notice of the time and place of any hearing shall be given at least ten (10) days prior to the date of hearing unless notice is waived by the parties.

012.02 Motions:

012.02A General form and procedure. Motions may be filed with the Commissioner by any party or upon the Commissioner's own motion as soon as either party becomes aware of facts requiring the motion. The motion must state specifically the facts as to why it is necessary. If the motion is made orally, the Commissioner may request that it be reduced to writing and filed with him. To avoid a hearing on the motion, it is advisable to secure the consent of the opposite party to the motion is not obtained, a hearing on the motion will be scheduled and the parties notified. The burden will be on the party filing the motion to show good cause why the motion should be granted. Notice will be given to all parties of the ruling of the Hearing Officer on the motion.

012.02B Types of motions. Types of motions which may be made by either party include but are not limited to:

012.02B(1) Motion for continuance.

012.02B(2) Motion for dismissal, which may be made on the following grounds for:

012.02B(2)(a) Lack of jurisdiction including but not limited to whether the petitioner is the proper party in the proceeding, whether there was a deficiency determination or whether the protest petition was filed within the statutory time limit,

012.02B(2)(b) Failure of party to state a cause of action, for if all facts alleged by the party are true, the operation of law will in no way change the notice of proposed deficiency determination,

012.02B(2)(c) Failure of a party to comply with these Practice and Procedure Regulations.

012.02B(3) Motion for default judgment may be filed and may be sustained whenever the party having the burden of proof fails to appear at a hearing,

012.02B(4) Motion for consolidation may be made in the following instances:

012.02B(4)(a) The same taxpayer has received separate deficiency notices relating to different taxable years or companies and, instead of contesting them in one petition at the outset, has filed a separate petition for each notice.

012.02B(4)(b) Different taxpayers receiving deficiency notices based on the same general issues may request consolidation of the cases, especially if they are represented by the same attorney or accountant. Even where separately represented, they may, by agreement, request consolidation of the cases. Some examples are:

012.02B(4)(b)(i) Stockholder's deficiency notices as to basis of stock sold or exchanged, gain or loss on reorganization, status of dividends received,

012.02B(4)(b)(ii) Partners,

012.02B(4)(b)(iii) Affiliated corporations,

012.02b(4)(b)(iv) Husband and wife who received separate deficiency notices,

012.02B(4)(b)(v) Transferees,

012.02B(4)(b)(vi) Lessor and Lessee,

012.02B(4)(b)(vii) Corporations involved in reorganizations,

012.02B(4)(b)(viii) Beneficiaries of estates or trusts,

012.02B(4)(b)(ix) Trusts created by the same grantor,

012.02B(4)(b)(x) Officers of corporation as to status of salaries disallowed the corporation as a deduction,

012.02B(4)(b)(xi) Corporation and stockholder.

012.02B(4)(c) The same taxpayer has received separate deficiency notices as to his own tax and as to his liability as transferee, or separate deficiency notices as to his liability as transferee of two transfers.

012.02B(4)(d) Different corporations, having the same stockholders, have received separate deficiency notices for each or all of the corporations.

012.03 Oath. All testimony presented before the Hearing Officer shall be given under oath which the Hearing Officer will have the authority to administer.

012.04 Production of evidence and testimony. The Hearing Officer may issue subpoenas, as permitted by law, compelling the attendance of witnesses and the production of records, papers, books, and accounts and documents, and cause the taking of depositions in accordance with District Court rules.

012.04A Subpoena. When a subpoena is desired, the proper party shall indicate to the Hearing Officer the name of the case and names and last known addresses of the witnesses to be called. If evidence other than oral testimony is required, each item to be produced must be adequately described. When properly prepared, the subpoena will be returned to the requesting party for service. Service may be made either by mailing a copy thereof by certified mail, return receipt requested, not less than six (6) days before the hearing date of the cause which the witness is required to attend or, personally, by any person not interested in the action. No costs for serving a subpoena will be allowed.

012.05 Admissibility of evidence.

012.05A Evidence having probative value. The Hearing Officer may admit and give probative effect to evidence which possesses probative value commonly accepted among reasonably prudent men in the conduct of their own affairs. Incompetent, irrelevant, immaterial, and unduly repetitious evidence may be excluded.

012.05B Evidence of a federal determination. Evidence of a federal determination whether it be a Treasury Department ruling or regulation or determination letter, a federal court decision or an Internal Revenue Service Assessment relating to issues raised in the proceeding shall be presumed to have conceded the accuracy of it unless the petitioner specifically states wherein it is erroneous.

012.05C Copies as evidence. A copy of any book, record, paper, or document may be offered directly in evidence in lieu of the original, where the original is unavailable or where there is no objection, and where the original is admitted in evidence, a copy may be substituted later for the original or such part thereof as may be material or relevant upon leave granted in the discretion of the Hearing Officer.

012.06 Exhibits.

012.06A Identification of exhibits. Exhibits attached to a stipulation or entered in evidence which are offered by a petitioner shall be numbered serially, i.e., 1, 2, 3, etc., whereas, those offered by the Department of Revenue shall be lettered serially, i.e., A,B,C, etc; and those offered jointly shall be numbered and lettered, i.e., 1-A, 2-B, 3-C, etc.

012.06B Disposition of exhibits. After a Findings and Order has become final, either party desiring the return, at his own expense, of any exhibit belonging to him shall make application in writing to the Hearing Officer within thirty (30) days suggesting a practical manner of delivery; otherwise, exhibits may be disposed of as the Hearing Officer deems advisable.

012.07 Official notice of evidence. The Hearing Officer may take notice of judicially recognizable facts and of general, technical, or scientific facts within the specialized knowledge of the Commissioner's office. Parties to a proceeding shall be notified either

before or during the hearings of the facts so noticed and shall be afforded an opportunity to contest such facts.

012.08 Evidence outside the record. Except as provided by these regulations, the Hearing Officer will not consider factual information or evidence in the determination of any proceeding unless the same shall have been offered and made a part of the record in the proceeding.

012.09 Presentation of evidence and testimony.

012.09A Presentation. In any hearing, every party thereto shall have the right to present evidence and testimony of witnesses and to cross-examine any witness who testifies in behalf of an adverse party. Opportunity shall be afforded every party to present evidence and testimony as rebuttal to evidence presented by another party, except that repetitious evidence shall be excluded.

012.09B Rules of evidence. Any party may request that the proceeding be bound by the rules of evidence applicable in a District Court of Nebraska. Such party shall file with the Hearing Officer, at least three (3) days prior to the date of the scheduled hearing, a written request that the hearing be so conducted. The request for the application of District Court rules of evidence shall be in writing and include an agreement by the requesting party that he shall pay the cost incurred by the request and that he shall procure at his own cost and on his own initiative, the court reporting services for the hearing.

012.10 Conduct of hearing. A hearing shall be conducted by a Hearing Officer who, among other things, will open the proceedings, take appearances, administer oaths, and subpoena witnesses; hear the evidence and rule on the motions and objections; interrogate witnesses; and close the proceedings. If the petitioner is not represented by anyone qualified to make an appearance, the Hearing Officer shall explain to the petitioner the Rules of Practice and Procedure and generally shall conduct the hearing in a less formal manner than that used when a petitioner has a representative qualified to appear. It should be the purpose of the Hearing Officer to assist any petitioner who appears without such a representative to the extent necessary to allow him to fairly present his evidence, testimony, and arguments on the issues.

012.11 Arguments as to law. The parties should be prepared to make oral argument as to the law at the conclusion of a hearing. A written memorandum of law may be filed at the time of the hearing at the discretion of any party or at a subsequent time if the Hearing Officer so directs.

012.12 Records. The petitioner may request and obtain a certified copy of the record of the hearing. Charges for preparing the certified copy of the record shall be paid by the party requesting it. Testimony in any hearing may be taken by tape recording. The official record will consist of the exhibits and transcription of said recording, except where a party has requested that the District Court rules of evidence apply to the hearing.

(Sections 3-148, 57-712, 66-408, 66-410.05, 66-630, 77-375, 77-376, 77-2605, 77-2709(8), 77-27,119, 84-909, 84-913, 84-914, 84- 915, R.R.S. 1943. Section 77-2711, R.S.Supp., 1982. December 5, 1982.)